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Antitrust—Sherman Act—Coercive Price Fixing by Consignor.—Simpson v. Union Oil Co.

Dwight W. Miller

CASE NOTES

Antitrust—Sherman Act—Coercive Price Fixing by Consignor.—*Simpson v. Union Oil Co.*[1]—Union Oil Company, a supplier of gasoline in eight western states,[2] owned about 2000 stations which it leased to independent retailers.[3] As a condition of obtaining or renewing a yearly lease, the independent retailer had to sign a consignment agreement which provided that Union would set the prices at which the independent retailer could sell the gasoline. By the terms of the agreement, title to the gasoline was to remain in Union until sold by the retailer-consignee, who was to receive a minimum commission. Union was to pay all property taxes on all gasoline in the consignee's possession; the consignee, however, was to carry personal liability and property damage insurance and was to assume the risk for all losses of the consigned gasoline, except those caused by specified acts of nature. When Simpson, a consignee, sold gasoline below the price fixed by Union, Union refused to renew his lease. Simpson brought suit, claiming that the one year lease, coupled with the consignment agreement, constituted coercive price fixing in violation of the Sherman Act.[4] The Federal District Court for the Northern District of California granted Union's motion for summary judgment, holding that Simpson had neither shown illegal price fixing nor suffered any actionable damage.[5] The Court of Appeals for the Ninth Circuit affirmed on the limited ground that Simpson had suffered no actionable wrong or damage.[6] The United States Supreme Court, in reversing and remanding for a hearing on all other issues including the issue of damages, HELD: The consignment agreement, coupled with the threat of non-renewal of the one year lease, was a coercive price fixing arrangement, and thus illegal under the Sherman Act.

This decision has far-reaching significance since similar consignment-lease agreements are widespread throughout the gasoline industry.[7]

The Court held the consignment agreement illegal because of the coercion Union employed by means of the combination of the lease with the agreement to sell at fixed prices. A parallel was drawn to the resale price maintenance scheme struck down in *United States v. Parke, Davis & Co.*[8]

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1 377 U.S. 13 (1964).

2 The eight states are California, Washington, Oregon, Nevada, Arizona, Montana, Utah and Idaho.

3 The Union Oil Company supplied gasoline to 4,133 retail stations; 2,003 of these were owned and leased by Union and, in turn, leased or subleased to an independent retailer. Union Oil as of the date of this action had consignment agreements with 1,978 (99%) of the retailer-lessees.

4 The action was brought under 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958), alleging violation of 50 Stat. 639 (1937), 15 U.S.C. § 1 (1958) and 26 Stat. 209 (1890), 15 U.S.C. § 2 (1958).

5 Simpson v. Union Oil Co., 1961 Trade Cas. 69936 (N.D. Cal. 1960).

6 Simpson v. Union Oil Co., 311 F.2d 764 (9th Cir. 1963).

7 Petition of Union Oil Company for Rehearing, p. 2.

8 362 U.S. 29 (1960). See 5 B.C. Ind. & Com. L. Rev. 687 (1964) for a detailed discussion of this case and the problems of resale price maintenance.

In that case, there was no consignment agreement; a manufacturer sold drugs outright to wholesalers and retailers. No price fixing arrangements were made, but representatives of the manufacturer (personally) visited the wholesalers and retailers and told them that the manufacturer would refuse to deal with them if they sold below a certain price. The wholesalers were further told that the manufacturer would refuse to deal with them if they sold to retailers who sold below the minimum price. The Court found that, with respect to the retailers, the manufacturer's program amounted to more than a simple refusal to deal; it amounted to coercion since the wholesalers were being enlisted to "effectuate the retailers' adherence to the suggested retail prices."[9] If the Court in *Simpson* had found that the gasoline was *sold* by Union and *purchased* by Simpson, that is, that the consignment agreement was really a sham since possession and most of the attendant risks rested in the consignee, then *Parke, Davis* would have been clear precedent for holding that the threat of non-renewal of the lease was illegal coercion designed to achieve resale price maintenance. Certainly the coercive element was stronger in *Simpson* than it was in *Parke, Davis*; in the former case the consignee was threatened with loss of his entire business, whereas in the latter the dealers were threatened only with loss of a particular line of goods. But the Court says clearly that the agreement was a true consignment agreement, that title to the gasoline remained in the oil company until sold to the ultimate consumer, and that there was no sale. Nevertheless, the Court held that the agreement was for *resale* price maintenance, coercively implemented and thus illegal.[10] Said the Court, ". . . A consignment is not allowed to be used as a cloak to avoid § 3 of the Clayton Act."[11]

In striking down the consignment agreement in *Simpson*, the Court was forced to consider *United States v. General Elec. Co.*,[12] a case in which a similar consignment agreement was upheld. This case was not overruled but distinguished on the ground that the product involved, lamp bulbs, was patented.[13] The Court stated that the holder of a patent had the right under such patent to fix the prices at which the article could be sold.[14] The Court might also have distinguished the cases on the ground that the element of coercion was missing in *General Electric*.

The Court pointed out that it was not holding all consignment agreements illegal.[15] It was only outlawing the use of the consignment device as a means of coercively maintaining a vast system of fixed prices. Thus it would appear that in the future the law of resale price maintenance in the area of consignment agreements will not differ greatly from that governing purchase and sale agreements. In the area of purchase and sale agreements,

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[9] Id. at 46.

[10] Simpson v. Union Oil Co., supra note 1, at 24.

[11] Id. at 18.

[12] 272 U.S. 476 (1926).

[13] In his dissent in *Simpson*, Mr. Justice Stewart pointed out that in *General Electric* the Court gave no intimation that its conclusion upholding a consignment agreement under the Sherman Act would have differed in any respect if the consigned article had not been patented. Simpson v. Union Oil Co., supra note 1, at 27-28.

[14] Id. at 24.

[15] Id. at 23.

a manufacturer who simply refuses to deal with a retailer selling below a minimum price does not act illegally.[16] As *Parke, Davis* points out, it is only when the manufacturer applies coercion above and beyond the simple refusal to deal that illegality arises. However, it should be noted that courts have not been at a loss to find the necessary coercion.[17] In view of this and the holding in the present case, it would appear that if there is any element of coercion used to enforce prices fixed by a consignment agreement, the courts will find a violation of the Sherman Act.

It is difficult, however, to conceive of a consignment agreement covering many retailers in which a court could not detect coercive measures. Indeed, even if a legal, non-coercive agreement could be drafted, it would invite expensive litigation. Therefore, it would seem that gasoline suppliers will in the future have to depend upon competition to maintain steady prices or else operate their own stations with their own employees. The latter solution appears to be preferrable in light of *United States v. Standard Oil Co.*[18] where the government noted that gasoline companies have the right to operate their own stations and to sell in them any products they manufacture or distribute.

DWIGHT W. MILLER

Corporations—Fiduciary Duty of Director of Full and Frank Disclosure in Adversary Proceedings.—*Alleghany v. Kirby*.[1]—In December, 1949, Kirby, president of the Alleghany Corporation, and three other officers and directors voted to exchange their personally held shares of Alleghany preferred stock for Alleghany's holdings of Investment Diversified Services, Inc. (IDS). Kirby transferred his Alleghany stock to Alleghany for 24,062 shares of IDS priced at slightly over $8. In 1954 the IDS stock had risen to $200 per share and Kirby had profited by more than $4,500,000. Several suits were brought against Kirby and others in state and federal courts in 1954-1955 by stockholders of Alleghany. Ten of these suits were consolidated under the title, *Zenn v. Anzalone*.[2] The consolidated complaint alleged a conspiracy by Kirby and others to enrich themselves at the expense of Alleghany and fraudulently to induce the stockholders to ratify such acts by misrepresenting the financial picture of IDS in proxy statements used at the stockholders' meeting of May 3, 1950. The focal point of the *Zenn* suit was the IDS stock deal and the inside knowledge of the defendants concerning the enormous prospective increase in earnings of IDS.

A settlement stipulation was drafted in July, 1955. After notice was given to all stockholders, a referee began a hearing on the merits of the fairness and adequacy of the settlement, which was, in effect, a hearing on the merits

[16] Klein v. American Luggage Works, Inc., 323 F.2d 787 (3d Cir. 1963).

[17] See 5 B.C. Ind. & Com. L. Rev. 687 supra note 8 for some conditions relied on by the courts to find this element of coercion.

[18] 78 F. Supp. 850 (S.D. Cal. 1948).

[1] 333 F.2d 327 (2d Cir. 1964).

[2] 17 Misc.2d 897, 191 N.Y.S.2d 840 (Sup. Ct. 1959).